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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 226

THE DREDGE CORPORATION, a Nevada corporation,
Petitioner,

vs.

HUSITE COMPANY, a Nevada corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

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HUSITE COMPANY, a Nevada corporation,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada entered in the above case on February 28, 1962.

Opinions Below.

The opinion of the Eighth Judicial District Court of the State of Nevada is unreported.

The opinion of the Supreme Court of the State of Nevada is not yet officially reported, but is unofficially reported in 369 P. 2d 676.

Jurisdiction.

The judgment of the Supreme Court of the State of Nevada was made and entered on February 28, 1962. A copy thereof is appended to the petition in the Appendix at pages 8-31. The Petition of the Dredge Corporation for a rehearing was denied on April 2, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Statutes, Federal Rules and Regulations Involved.

The pertinent portions of Article V of Amendments to the Constitution of the United States, The Taylor Grazing Act, 43 U. S. C., Ch. 8A, §315g and 315e; the Administrative Procedure Act of the United States, 5 U. S. C., Ch. 19, §1001, *et seq.*; 30 U. S. C., §21 *et seq.*, are set forth in the Appendix at pages 1-7.

Questions Presented.

This is a case of first impression in the Supreme Court of the United States with respect to the rights of adverse claimants to federally owned land under two separate federal statutes. The petitioner is claiming title by virtue of the mining laws of the United States (30 U. S. C.); Husite is asserting its title under patents issued under the Taylor Grazing Act, 43 U. S. C. §315g.

Petitioner filed its complaint in the Nevada State Court to quiet title to eight unpatented association placer mining claims. Husite counterclaimed to quiet its title to the same land by virtue of its patents from the United States.

Both parties moved for summary judgment based on the pleadings and affidavits on file. The trial

court denied the petitioner's motion and granted the motion of Husite declaring that the failure of the petitioner to protest during the period of publication of the application for an exchange of land filed by Husite under the Taylor Grazing Act with knowledge of the same was fatal to its cause.

The trial court did not feel that an issue was created by certain facts raised in the affidavit by which an estoppel was attempted to be asserted against Husite concerning promises to respect and protect the rights of petitioner in the land now claimed by both parties.

The Supreme Court of the State of Nevada affirmed, basing its decision on the ground that no valid mining rights existed in the petitioner. It was *assumed*, with no evidence in or out of the record, that the Bureau of Land Management had made an examination of the land on which the placer mining claims existed and that the land was determined to be non-mineral. Having thus *assumed* away the mineral character of the land, the court upheld Husite's title under its patents and divested Petitioner's vested right in the land. It is a matter of public record in the United States Bureau of Land Management that there was no determination respecting the validity of Petitioner's rights in the placer mining claims. The Supreme Court of the State of Nevada refused to take judicial recognition of such public record.

The court held further that Dredge's claimed violation of procedural due process is without merit on the ground that Dredge's mining locations were subsequent in point of time to the filing of respondent's application for exchange under the Taylor Grazing Act (but prior to publication of the Husite application).

The questions presented are:

1. Whether the Nevada Supreme Court's decision invalidating mining locations established after an exchange application is filed (but prior to publication of notice of the application) is inconsistent with 43 U. S. C., Ch. 8A, §315e.

2. Whether the State Supreme Court can, consistently with the Decisions of the Secretary of the Interior, hold that no valid mining claim exists in the absence of a hearing under the Administrative Procedure Act.

3. Whether a mining claimant must file a protest against an application made under the Taylor Grazing Act during the period of publication in light of 43 U. S. C., Ch. 8A, §315e.

4. Does the mere filing of an application for exchange under the Taylor Grazing Act segregate the land from appropriation under the mining laws?

5. Whether a summary judgment can be validly granted where the validity of the petitioner's mining claims are drawn in issue and there has been no administrative proceeding of any kind by the proper governmental agency to determine the validity of such mining claims, nor any trial with respect to this issue.

Statement.

This action arose out of conflicting claims to certain Federal public lands situated in the State of Nevada. Petitioner has claimed title under the mining laws of the United States. Husite has claimed title to a tract of land consisting of 12,000 acres patented

to it in fee simple by the Department of the Interior under the Taylor Grazing Act. A portion of the perimeter of the land claimed by Husite encompasses the land claimed by the petitioner. The land claimed by the petitioner consists of eight unpatented association placer mining locations. The amended application for exchange by Husite excluded "valid mineral rights." Petitioner is claiming that the patent to Husite included land on which it had established valid mining claims and which had been segregated from the public domain by virtue of petitioner's compliance with the mining laws *prior* in point of time to publication of notice of the Husite application and the issuance of patent to Husite.

The chronological events leading up to the action and this petition are as follows:

July 19, 1950—Husite's original exchange application under 43 U. S. C., Ch. 8, §315g filed.

July 1, 1952—Husite's amended application filed, excluding "valid mineral rights".

July 14, 1952—Dredge's location notices recorded, and asserted in Dredge's pleadings that there was a discovery of mineral on each claim.

July 19, 1952—Dredge's certificate of location recorded.

September 4, 1952—Dredge's amended certificate of location recorded.

October 1952—Publication of notice of the exchange application of Husite. The exact dates are not alleged in the Husite pleadings nor was Husite required to offer any proof of such publication by the courts below.

January 27, 1953—Date of patent to Husite for approximately 12,000 acres of land, including the two sections claimed by Dredge by reason of its asserted locations.

February 23, 1956—Date of amended patent in fee simple to Husite.

January 27, 1959—The petitioner filed a complaint in the District Court of Clark County, Nevada to quiet title to its mining claims [Fol. 1-9].

Husite moved for a More Definite Statement [Fol. 10-18]. Petitioner filed a More Definite Statement alleging, among other things, as follows:

> "Plaintiff became the owner and entitled to the following mining claims by reason of the original location of said claims on the dates shown on the following schedule." [Fol. 28].

The More Definite Statement then sets out the claim numbers, date recorded, document number and description. Discovery of minerals is alleged as of the same date as location [Fol. 28].

Husite filed an answer and counterclaim [Fol. 31-72].

After the respective parties filed their amended pleadings [Fol. 82-153], Husite moved the court for a Summary Judgment [Fol. 154-159]. Petitioner filed a cross motion for Summary Judgment and for leave to file an amended complaint [Fol. 178-189].

On January 11, 1961 the trial court denied petitioner's motions and granted Summary Judgment in favor of Husite [Fol. 370-375].

The trial court in its brief decision (less than two pages) determined that no issues of fact were created by the pleadings and stated as follows:

> "The fact remains now, however, that plaintiff did not protest at the hearing, made no effort to do so, and apparently from the file, with knowledge of the hearing." [Fol. 373]. (The "hearing" referred to by the trial court is illusory inasmuch as no hearing was ever had.)

In the trial court, petitioner filed a Brief in Opposition to Defendant's Motion for a Summary Judgment and In Support of Dredge's Motion for Summary Judgment [Fol. 190-219].

Dredge's brief pointed out the following to the trial court:

> "Unpatented mining claims are real estate to all intents and purposes. 30 U. S. C. 26." [Fol. 194].

Petitioner further pointed out the decision of the United States Supreme Court in *Emil L. Krushnic v. U. S.*, 280 U. S. 305, 74 L. Ed. 445 wherein the court states at page 316:

> "The rule is established by innumerable decisions of this court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of the term; and may be sold, transferred, mortgaged, and inherited without infringing any right of title in the United States. The right of the owner is taxable by the state; and is 'real property,' subject to the lien of a judgment recovered against the owner in a state or territorial court. (Citing cases.) The owner is not required

to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not ipso facto forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation." [Fol. 194-196].

Petitioner in support of its claim also brought to the attention of the trial court §315e of the Taylor Grazing Act (Appendix, p. 1).

Petitioner filed a closing brief in Support of Its Motion for Summary Judgment, and in Opposition to Defendant's motion for Summary Judgment and asserted therein as follows:

"(c) The actions and procedures of Husite in this case, and the action of the Department of the Interior in attempting to deprive The Dredge Corporation of its property are, and each is, in violation of the Constitution of the United States and of the Constitution of the State of Nevada and therefore void, because each action denies due process of law and is contrary to the Administrative Procedure Act." [Fol. 282-283].

Petitioner's Closing Brief also cites passages from *Lindley on Mines*, Third Ed., Vol. 2, Tit. VI, Ch. 1, p. 1193, *et seq.* entitled "The Character of the Tenure".

"As was said by the Supreme Court of Nevada, the courts and the laws, adapting themselves to the

> necessity of the case, and governed by rules of common sense, reason and necessity, have universally treated the possessory rights of the miner as an estate in fee."

At page 1201, *Lindley* says:

> ". . . Yet, as between the locator and everyone else save the paramount proprietor the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee. As between the locator and the government, the former is the owner of beneficial estate; and the latter holds the fee in trust to be conveyed to such beneficial owner upon his application in that behalf and in compliance with the terms prescribed by the paramount proprietor." [Fol. 286-287].

Numerous other authorities were cited by the petitioner in support of its position which were not discussed in the opinion of the trial court. Those in point here are cited *infra*. The main thrust of the lower court's decision was that Dredge had failed to file a protest to the exchange application of Husite during the period of publication. Under the *mining* laws (30 U. S. C. §30) it is provided that a protest must be filed during the period of publication of application for patent by one mining claimant against another mining claimant where there are prior mining rights asserted to the land applied for. The Taylor Grazing Act contains no such provision.

On February 4, 1961, petitioner moved for a rehearing in the trial court on the summary judgment and motion to amend [Fol. 385-387].

On March 7, 1961, Dredge's petition for rehearing in the trial court was denied [Fol. 448-450] and an order and Judgment was entered on March 13, 1961 [Fol. 448-450].

Dredge filed a Notice of Appeal on February 23, 1961 [Fol. 415-417].

Petitioner filed its Opening Brief. Husite filed its Answering Brief and plaintiff then filed its Closing Brief.

In its decision of this case (Appendix, p. 15), the Supreme Court of Nevada quotes from *Wilbur, Secretary of the Interior v. United States ex rel. Krushnic, supra,* upon which petitioner premised in part his assignments of error. The court found no quarrel with the rule of law stated in the *Krushnic* case.

The Nevada Supreme Court then states (Appendix, p. 22):

> "(5) Dredge contends: 'There was no claim by defendant Husite that there ever was a hearing or decision concerning the validity of the eight Dredge placer mining claims herein involved prior to the issuance of its patents, or at any other time. Before there could be any such decision, a contest must have been filed; a hearing must have been held under the Administrative Act; a decision rendered, with possible appeals and court action following'."

The court then states as follows:

> "The record does not show just when the Bureau of Land Management made its examination of the

ground to determine its mineral or non-mineral character. It must be assumed however that at some time during the period of two years before the asserted Dredge locations were made, such examination and determination had been made, and the application was in the process of going through the usual channels for issuance of patent."

Petitioner has previously pointed out, and it is a matter of public record, that no such determination was made on the part of the Bureau of Land Management or any other agency of the government. The requirement for a hearing was pointed out to the court in petitioner's Closing Brief citing the case of *United States v. Keith V. O'Leary, et al.*, A-27260, 63 I. D. p. 341, wherein it was stated by the then Secretary of the Interior at page 344 *et seq.* as follows:

"A valid mining claim gives an exclusive right of possession and enjoyment, and the claim is property in the fullest sense. Cole v. Ralph, 252 U. S. 286, 295 (1920). Thus a hearing on the validity of a mining claim is a hearing on a claim to property. . . . Inasmuch as a mining claim is a property claim which may not be invalidated without due process of law, hearings on the validity of such claims seem clearly to be within the scope of the court decisions referred to above holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hear-

ing. In accordance with these decisions, the Department concludes that the hearing requirements of the Administrative Procedure Act are applicable to hearings on the validity of mining claims."

The opinion of the Supreme Court of the State of Nevada then discussed Dredge's contention that the Department of the Interior has deprived Dredge of its property in violation of the Constitution of the United States as alleged in Dredge's pleadings previously referred to. The court held as follows (Appendix, p. 24):

"That this contention is without merit is evident from the undisputed facts. Dredge does not even assert that it was ever on or ever claimed or ever heard of any part of this land for over two years after Husite filed its exchange application. Upon the filing of such application the Bureau of Land Management published notice that any adverse claimants should file their claims or objections with the Bureau. Dredge had notice and knowledge of the filing of the exchange application but filed no claims to any part of the land or any objections to the granting of Husite's application."

Contrary to the statement of the Nevada Supreme Court above, it must be noted here again that Dredge had recorded its mining locations prior to the published notice by Husite.

The court did not discuss §315e of the Taylor Grazing Act which deals with the development of mineral resources (Appendix, p. 1).

Petitioner brought to the court's attention in its opening brief on appeal the case of *Noyes v. Mantle*, 127 U. S. 348, 32 L. Ed. 168, 8 Sup. Ct. Rep. 1132-1. The United States Supreme Court in that case stated:

> "At any rate, as already stated, it could not convey property which had already passed to others. A patent of the United States cannot, any more than a deed of an individual, transfer what the grantor does not possess."

In its Closing Brief in Support of Its Motion for Summary Judgment [Fol. 294] and in its Opening Brief on Appeal at pages 5, 7, 9, 18 and in its Closing Brief on Appeal at pages 16, 17, 28, petitioner brought to the attention of the courts below the case of *Montgomery v. Gerlinger*, 146 Cal. App. 2d 650, 304 P. 2d 93, which involved a conflict between a mineral claimant of unpatented placer mines and a non-mineral claimant.

The Opening Brief continued to cite cases cited in the *Montgomery* case including the case of *St. Louis Mining and Milling Co. v. Montgomery Mining Co.*, 171 U. S. 650, 655, 43 L. Ed. 320, 322, 19 S. Ct. Rep. 61 and 63 wherein the then Chief Justice declared that:

> "Where there is a valid location of a mining claim, the area becomes segregated from the public domain, and the property of the locator."

In its decision of *Dredge v. Husite*, the Supreme Court of the State of Nevada states as follows (Appendix, p. 19):

> "Appellant in support of its contention that a valid mining claim properly located and maintained

in accordance with the law segregates the ground legally embraced therein from the public domain, to the end that the United States may not lawfully convey such ground to a subsequent applicant, cites among others, the following cases. (Citing cases.)

"A careful examination of those cases shows that in every one the mining claim upon which reliance was placed was a valid mining claim."

The Supreme Court of the State of Nevada then concluded that the cases cited did not apply since proof of a valid mining claim did not exist in the pleadings of Dredge.

The Supreme Court of Nevada in its opinion states (Appendix, p. 20):

"We have heretofore cited in some detail Dredge's more definite statement filed in response to Husite's demand. Yet it refrained from any allegation or assertion that it had ever made a discovery of mineral, to any extent whatsoever, that it ever erected a monument, drove a stake, or posted a notice, restricting itself to an unsworn statement signed by its attorneys that it had recorded *location notices,* whose dates showed that the 'asserted locations' had been made over two years after the filing of Husite's exchange application."

Dredge's more definite statement did contain, however, the schedule of the original location of its mining claims including the dates recorded, the document numbers and the description of the property located. The Nevada Supreme Court did not take judicial

recognition of the fact that location notices and certificates of location once recorded were matters of public record. Such notices and certificate contain statements that a discovery had been made, that a stake was driven and that notices were posted on the property. The location notices and certificates of location further showed the amount of money expended, the nature of the work performed, where such work was done on the property, and the other acts required by the mining laws.

Again it should be noted that the recording of the location notices was done at a point in time prior to publication of the Husite exchange application.

The pleadings by Husite raised the question of the validity of the Dredge mining claims and the court *assumed* that they were invalid in spite of the fact that there had been no notice of contest or of any hearing by the proper governmental agencies. The Nevada Supreme Court did not discuss the *United States v. Keith V. O'Leary* decision.

Reasons for Granting the Writ.

The decisions below should be reviewed because they erroneously interpret the Taylor Grazing Act so as to render nugatory the language contained in §315e of that Act and prohibit the application of the mining laws. The question as to whether a protest is necessary on the part of a mining claimant against an applicant for surface grazing lands in the light of §315e of the Taylor Grazing Act has not yet been determined by the United States Supreme Court.

1. The language of the Supreme Court of Nevada (Appendix, p. 24) would have the effect of restrict-

ing prospecting, locating, developing, mining, entering, leasing or patenting the mineral resources of such land as soon as an application was filed for an exchange under §315g of the Taylor Grazing Act. If this were the intent of Congress, then why was §315e of the Taylor Grazing Act inserted?

An interpretation of §315e of the Taylor Grazing Act, or its lack of interpretation by the state court, has had the effect of denying to the petitioner a right which has been expressly granted by Congress in that section of the Act. The Nevada Supreme Court has thus assumed a power which it does not possess and which it cannot validly exercise.

2. The Supreme Court of the State of Nevada has also assumed that there had been a determination by the Bureau of Land Management that the lands patented were non-mineral in character. There was nothing in the record to indicate this fact as the court itself had pointed out. As a matter of fact and of public record, no such determination was made by any agency of the government. Thus, by patenting the land claimed by petitioner to Husite, petitioner was denied the procedural due process of law provided for that purpose in the Administrative Procedure Act respecting mining claims. *United States v. Keith V. O'Leary et al.*, 63 I. D. p. 341, cited *supra* is unequivocal in its statement of the policy of the Department of the Interior in this regard.

There can be no question that had petitioner filed a protest during the pendency of Husite's application for exchange that a hearing would have taken place and petitioner would have been afforded due process.

Was the petitioner, a mining claimant, required to file a protest against an applicant for surface grazing land under the Taylor Grazing Act. This would again call for an interpretation of §315e concerning the development of mineral resources.

To summarize the conflict that exists as a result of the decision of the Nevada State Supreme Court:

That court has held as a matter of law that no valid mineral rights existed in the petitioner at the time patent was issued to Husite Company or during the application for exchange. Yet it has been stated as the policy of the Department of the Interior in the *O'Leary* case *supra* that a hearing is required under the Administrative Procedure Act to determine the validity of mining claims in order to satisfy procedural due process as guaranteed by the Fifth Amendment of the Constitution of the United States.

Montgomery v. Gerlinger, supra held that the rights of the placer mining claimants were superior to those of a subsequent non-mineral patentee from the United States notwithstanding the fact that they had not filed a protest. The Supreme Court of Nevada distinguished the case on the ground that petitioner had failed to prove the existence of a valid mining claim.

The Supreme Court of the United States has stated that a properly located unpatented mining claim "for all practical purposes of ownership, is as good as though secured by patent". Since the location of petitioner's mine was prior in point of time to the patent to Husite, or for that matter prior to publication of the Husite exchange application. The decision of the Nevada State Supreme Court is in direct conflict with the

decisions of the Supreme Court of the United States in *Krushnic v. U. S.*, *Noyes v. Mangle*, and *Lynch v. U. S. (supra)*, and has thus deprived petitioner of the rights reserved to it by these United States Supreme Court decisions.

The questions presented by this case are of great and recurring significance with respect to the development of mineral resources on public lands.

If the right to develop mineral resources ceases to exist after an application for exchange is filed under §315g; and before patent is issued, then a judicial determination of this fact by the United States Supreme Court will act as a guide to those who engage in prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts subject to the Taylor Grazing Act, and time, effort and means will not be expended by such persons.

If §315e of the Taylor Grazing Act preserves the right to develop mineral resources, then petitioner has been denied that right by the Supreme Court of Nevada in the assumption by it of a power that it does not possess.

Of additional importance is the denial of the right of the petitioner to the procedural due process guaranteed by the Fifth Amendment of the Constitution of the United States with respect to an administrative determination of the validity of its claim as provided by the Administrative Procedures Act (Appendix, pp. 5-6).

If the land located by a mining claimant is free land for all intents and purposes, then in the absence of a contest by the Bureau of Land Management of the

Department of the Interior to determine the validity of the mining claim, the decision of the Supreme Court of the State of Nevada is erroneous and should be reversed. For the correct disposition of this case the Supreme Court of the State of Nevada should have followed the decision by the United States Supreme Court *In re Emblen*, 161 U. S. 52, 56 (Appendix, p. 7).

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Statutes, Federal Rules and Regulations Involved.

Article V of the Amendments to the United States Constitution states:

"No person . . . shall be deprived of life, liberty or property without due process of law."

43 U. S. C. §315e:

"Rights of way; development of mineral resources

Nothing contained in this chapter shall restrict the acquisition, granting or use of permits or rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing contained in this chapter shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto. (June 28, 1934, c. 865, §6, 48 Stat. 1272)."

43 U. S. C. §315g:

". . . . (b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

. . .

"(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange,

describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this chapter shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located; *Provided,* that either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this chapter except one-half of the cost of publishing notice of a proposed exchange as herein provided. (June 28, 1934, c. 865, §8, 48 Stat. 1272, as

amended June 26, 1936, c. 842, Title I, §3, 49 Stat. 1976; June 19, 1948, c. 548, §1, 62 Stat. 533."

30 U. S. C. Ch. 2 §21

"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. (R. S. §2318.)"

30 U. S. C. Ch. 2 §22

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R. S. §2319; Feb. 25, 1920, Ch. 85, §1, 41 Stat. 437.)"

30 U. S. C. §30:

"The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the tenth day of May 1872 so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended down-

ward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical sidelines of such surface locations but their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. (R. S. §2322.)

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim is waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the Manager of the land office, together with the

certificate of the United States Chief Cadastral Engineer that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the Manager $5 per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the Manager to the Director of the Bureau of Land Management, and a patent shall issue thereon for the claim or such portion thereof as the applicant shall appear, from the decision of the court to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the United States Chief Cadastral Engineer whereupon the Manager shall certify the proceedings and judgment roll to the Director of the Bureau of Land Management, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatsoever."

30 U. S. C. §35:

"Claims usually called 'placers', including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; . . ."

5 U. S. C. Ch. 19, §§1004, 1004a, 1004b:

"In every case of adjudication required by statute to be determined on the record after opportunity for an

agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to §1010 of this Title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE OF HEARING AND ISSUES.

Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; (3) and the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact of law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE

The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy

by consent, hearing, and decision upon notice and in conformity with §§1006 and 1007 of this Title."

5 U. S. C. Ch. 19, §1009(a).

"Any person suffering legal wrong because of any agency action, or adversely affected or agreed by such action within the meaning of any relevent statute, shall be entitled to judicial review thereof."

In re Emblen, 161 U. S. 52, 56.

"After the patent has once been issued the original contest is no longer within the jurisdiction of the Land Department. The patent conveys the legal title to the patentee, and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen (the opposing claimant) is by appeal inequity to charge Weed (the patentee) with a trust in his favor.

Opinion of the Supreme Court of the State of Nevada.

The Dredge Corporation, a Nevada Corporation, Appellant, v. Husite Company, a Nevada Corporation, Responent. No. 4413.

[Filed February 28, 1962]

Appeal from judgment of the Eighth Judicial District Court, Clark County; David Zenoff, Judge.

Affirmed.

Deaner, Butler & Adamson, of Las Vegas, and George W. Nilsson, of Los Angeles, for Appellant.

Cantwell, Loomis & Murphy, of Reno, for Respondent.

By the Court, Badt, *C.J.*:

Appellant corporation, which was plaintiff below, will be referred to as Dredge. Respondent corporation, defendant below, will be referred to as Husite. Dredge filed its complaint to quiet title to eight community placer mining claims, alleging that it was the owner and entitled to possession thereof, and that Husite asserted an estate or interest therein, which was, however, without right. The land covered by the placer claims is described as sections 16 and 21, T. 20 S., R. 60 E., M.D.B.&M., in Clark County, Nevada. The pleadings will have to be referred to later at greater length. Under such pleadings and under the circumstances hereinafter set forth, both parties sought a summary judgment. Dredge's motion for summary judgment was denied, and Husite's motion for summary judgment granted and judgment entered accordingly. From such judgment Dredge has appealed.

Dredge claims title by reason of its placer locations. Husite asserts title by reason of two patents from the United States for some 12,000 acres of land, including the two sections embraced in the placers. The summary judgment in favor of Husite was based on Husite's patents. See infra, the chronological order of the locations, filings, etc.

Dredge's amended complaint contained two counts. The first count alleged simply its ownership of the eight placers, Husite's claim of title, and that the latter was without right. The second count included such allegations and alleged that Husite claimed title to the described lands in fee simple by reason of two patents from the United States government; that said patents were issued in exchange for other lands which were subject to a reservation of minerals by Southern Pacific Land Company, former owner, and that Husite's application for an exchange of lands excluded "existing gas and oil leases and other valid mineral rights"; that, under the provisions of the Taylor Grazing Act, when an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent shall contain a reservation of minerals to the United States; that since Husite's application and amended application under the Taylor Grazing Act offered to exchange lands in which minerals were reserved, and that since the Husite application excluded valid mining claims, Dredge, "the owner of eight valid placer mining claims," was not required to file any objection to such application for exchange; that at the time of Husite's application Dredge was the owner of said mining claims; and that by reason of the premises the United States was without authority to grant a fee simple title to Husite, and that

Husite holds all mineral rights in said claims in trust for Dredge. Dredge accordingly prayed that its title be quieted to the placer claims and that Husite be enjoined and barred from asserting any adverse claim therein; also that the court adjudge that Husite holds in trust for Dredge the said sections 16 and 21.

Husite answered, admitting that it claimed title by reason of the two patents which were issued by the United States in exchange for lands which were subject to a reservation of minerals by the Southern Pacific Land Company, a former owner, and admitting that its application for exchange excluded "existing gas and oil leases and other valid mineral rights," and admitting the provisions of the Taylor Grazing Act, above recited, in connection with reservation of minerals to the United States. Husite's second defense asserted that the particular provision of the Taylor Grazing Act, relied upon by Dredge, was only a partial recital of the provision, was not applicable to the exchange in question, and cited at length provisions of the Taylor Grazing Act assertedly applicable to the present exchange whereunder either party to an exchange may make reservations of minerals, easements, or rights of use.

As a third defense, Husite alleged that the complaint failed to state a claim against Husite upon which relief could be granted. As a fourth defense, Husite pleaded that Dredge had waived any right to hold the placer mining claims because it had failed to file a protest to the exchange application, although with notice and knowledge of the proposed exchange. Husite's sixth defense was that Dredge was guilty of laches in that it had notice of Husite's claim to absolute and exclusive ownership and nevertheless refrained from commencing

any action at law or equity "to enforce its rights for a period of more than four years after patents to said property were issued" to Husite. As a seventh defense, Husite asserted an abandonment by Dredge by reason of its failure to protest Husite's application.

Husite's eighth defense alleged that Dredge's claim was invalid in that its locations prior to patent were void after the issuance of patent. Husite's ninth defense alleged that Dredge does not hold a legal mining claim on the asserted placers in that (among other things) (c) the property described in the amended complaint is nonmineral in character and not subject to location or holding under the laws of the United States or the State of Nevada; and (d) that plaintiff had not discovered minerals within the limits of said claims or any of them, sufficient in quantity or quality to constitute a valid discovery.

Other paragraphs and subdivisions of paragraphs contained in the answer have been omitted as unnecessary to the determination of the appeal.

Husite's counterclaim alleged that it was and had been for many years the owner and in possession of all said sections 16 and 21 under patents identified by number, issued by the United States pursuant to an exchange of lands under the provisions of 43 U.S.C.A., Chap. 8A, sec. 315g (Supp. 1961), subsections (b) and (d), Taylor Grazing Act, as amended, and regulations of the Secretary of the Interior, 43 C.F.R. 146; that Dredge claimed an adverse interest by reason of certain mining claims, but that Dredge had failed and neglected to protest or file objection to Husite's application for patent, although with notice and knowledge thereof and that its claims

were without right and prayed that Dredge be barred from asserting any claim to the land. Annexed to such answer and counterclaim as exhibits were photostat copies of the two United States patents referred to. The first patent reserved to the United States all oil and gas deposits covered by existing oil and gas leases and all uranium, thorium, or any other material which is or may be determined to be peculiarly essential to the production of fissionable materials. The second patent quitclaimed to Husite all rights possessed by the government by reason of the reservation contained in the first patent.

Dredge replied to the counterclaim, admitted Husite's holding of the patents as alleged by it, but alleged that the patents were ineffective to convey to Husite the mineral rights, and alleged that notice to Dredge of the exchange application was ineffective so far as concerns Dredge's right to the land.

Husite moved for a more definite statement and Dredge now relies upon the information given in such "More Definite Statement" in response to such motion as establishing facts precluding a summary judgment in favor of Husite. To show more definitely "the means by which and the date on which Plaintiff and its predecessors in interest 'became the owner and entitled to possession' of said mining claims as alleged in * * * the complaint," as showing of such facts, we find Dredge's statement: "Plaintiff became the owner and entitled to possession of the following mining claims by reason of the original location of said claims on the dates shown on the following schedule." Here each of the eight placers is then listed, with description of the legal subdivisions covered, each being a quarter section, and each showing its "Document No." (which we may

assume for the purpose of this opinion to be that of the county recorder, although it is not identified as such) and each noting as "Dated Recorded, 7/14/52." It is then further recited: "The date of discovery of minerals corresponds to the date of location of said claims as shown by [said] schedule."

Such statement is unverified but is signed by the attorneys for Dredge. Other than such "More Definite Statement" and the statement of Dredge's conclusions of law and its amended complaint that it is the owner of and entitled to the possession of the eight described placers, and any admissions found in Husite's pleadings, there is nothing further in the record to support the repeated contentions in appellant's briefs and oral argument that Dredge was and is the owner of these eight "valid" placer mining claims. Dredge did not oppose Husite's motion for summary judgment by submitting the originals or copies of the location *notices* referred to in its schedule supporting its "More Definite Statement." Perhaps more important, it did not allege the recording of any location *certificates* or facts required by statute to be contained therein. And perhaps more important still, it did not by affidavit or otherwise submit any proof that it had ever made a discovery—and this, in the face of the admitted patents issued to Husite, covering the same ground under its original application filed over two years prior to the date of the purported location *notices*. We discuss later the entire absence of statutory or other presumption of discovery or location resulting from the recording of the location *notices*.

At this point it would be well to indicate the chronology of the filings involved in this appeal.

July 19, 1950—Husite's original exchange application under section 8 of the Taylor Grazing Act filed.

July 1, 1952—Husite's amended application filed.

July 14, 1952—Dredge's location notices recorded, and asserted in Dredge's "More Definite Statement" to be likewise *the date of discovery of mineral* on each claim.

January 27, 1953—date of patent to Husite for approximately 12,000 acres of land, including all of sections 16 and 21, the two sections claimed by Dredge by reason of its asserted locations.

February 23, 1956—date of amended patent to Husite.

January 27, 1959—Dredge's complaint to quiet title filed.

Against this record we are confronted with the constant assertions and repetitions in appellant's briefs and oral argument to the effect that the filing of the location notices segregated the placer claims from the public domain to the end that the United States was without authority to patent the land to anyone else until it had determined by proper objection or contest, hearing, proof and decision that the claims were not valid.

Specifically Dredge assigns as error the trial court's refusal to grant its motion for summary judgment, its order granting Husite's motion for summary judgment, and dismissing the complaint with prejudice, "because [of] undetermined issues of fact tendered by the defendant's answer, counterclaim and cross-complaint."

In its briefs and oral arguments Dredge amplifies these assignments of error as follows: A. Dredge's title to its eight asserted placers, so far as Husite was con-

cerned, was equivalent to a fee title. This, because (1) on the dates of issuance of the patents to Husite the eight placers were valid, subsisting placer mining claims, because the claims had been located on the ground, copies of location notices recorded, all in accordance with the requirements of the mining laws; (2) because neither Husite nor the United States had questioned the validity of the eight placers prior to the issuance of the patents to Husite; (3) because mining claims are valid until abandoned or declared invalid after the filing of a proper contest and after notice, hearing, and determination.

B. Dredge's next contention is that the Department of the Interior had no authority to issue the patents because Dredge owned eight valid and subsisting placer mining claims, which withdrew sections 16 and 21 from the public domain.

C. Dredge's next specific assignment of error is that "numerous issues [of fact] were tendered by Husite."

(1) Dredge's assignments of error, as outlined in its assignments A and B, may be grouped together. All these assignments are premised upon the statement quoted from Wilbur v. United States, 280 U. S. 306, 50 S. Ct. 103, 74 L. Ed. 445, as follows: "The rule is established by innumerable decisions of this Court, and of State and lower federal courts, *that, when the location of a mining claim is perfected under the law,* it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. * * * The owner is not required to purchase the claim or secure patent

from the United States; *but, so long as he complies with the provisions of the mining laws,* his possessory right, for all practical purposes of ownership, is as good as though secured by patent."

We have underscored those parts of the quotation which are conditions entirely absent from the record in the instant appeal. No quarrel may be had with that statement of the law. It appears in numerous decisions of the United States Supreme Court and of this court and the courts of last resort in virtually all the mining states. To bring itself within the rule thus stated Dredge urges on page after page of its briefs and in continuous repetitions in its oral argument that it "owned" the land, that it had "*valid*" mining claims on the land, that its "*valid*" mining claims segregated the land from the public domain, that the United States did not own it and could not sell it or patent it or give it away to any other person without first, by an appropriate action against Dredge, disposing of its claims. When questioned during the oral argument, Dredge frankly conceded that its entire appeal was premised upon this contention that the two sections in question were covered by *valid* placer mining claims. True, it is said in its complaint, "I am the owner of this ground." True, it stated in its "More Definite Statement," unverified and signed only by its attorneys, who did not purport to have any actual knowledge in the premises, that it was in possession by reason of the work involved in staking the original claims and the assessment work performed thereon, and had filed location notices, and that the date of discovery corresponds to the date of the location, all on June 14, 1952. It is under such showing in the record that Dredge contends that it was entitled to a

summary judgment in its favor and that the showing was sufficient to defeat Husite's motion for summary judgment based on the patent issued to it.

It is, for our purposes, necessary only to refer to the following cases as determinative of appellant's main contention: Burke v. Southern Pacific R. R. Co., 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527; Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co., 36 Nev. 543, 138 P. 71; Earl v. Morrison, 39 Nev. 120, 154 P. 75; Gale v. Best, 78 Cal. 235, 20 P. 550, 12 Am. St. Rep. 44; Crofoot v. Hill, 74 Nev. 173, 326 P.2d 417; Wilson Creek Cons. M. & M. Co. v. Montgomery, 23 L.D. 476; United States v. Iron Silver Mining Co., 128 U.S. 673; 9 S.Ct. 195, 32 L.Ed. 571; Chino Land & Water Co. v. Hamaker, 39 Cal. App. 274, 178 P. 738; Southern Development Co. v. Enderson, 200 F. 2d 272; Western Pacific Railroad Co. v. United States, 108 U. S. 510, 2 S. Ct. 802, 27 L. Ed. 806; Noble v. Union River Logging R. R. Co., 147 U. S. 165, 174-175, 13 S. Ct. 271, 274, 37 L. Ed. 123, 127.

These cases firmly establish the following principles of law governing the determination of the main issues presented.

a. A patent is the act of a legally constituted tribunal, done within its jurisdiction, and passes the title.

b. Such patent is a final judgment as well as a conveyance. It is conclusive upon a collateral attack.

c. Such patent issued with a reservation of minerals is a conclusive and official declaration that the land is nonmineral, and that all the requirements preliminary to the issuance thereof have been complied with, and that all antecedent steps necessary to its issue have been properly and legally taken.

d. The basis of a valid mining claim is discovery. Discovery is the most important of all the acts required in the proceedings culminating in a perfected location. It is the foundation of the right with which all other acts are idle and superfluous.

e. Without a discovery there is no valid mining claim.

f. The proposition that any recorded notice of a so-called location is conclusively presumptive of the existence of valuable ore within its limits is without merit.

g. Upon a private exchange application under the Taylor Grazing Act the Department of the Interior, Bureau of Land Management, is required to investigate the validity of any claim on file with respect to the property. The rules of the department implement the statute, including requirements for examination and recommendation by the United States Geological Survey as to the mineral or nonmineral character of the land.

h. The mere filing of a notice of placer location, without more, does not segregate the ground from the public domain so as to prevent the United States from issuing a patent under any of the applicable laws of Congress, nor does it prove the existence of known mineral ground.

It is unnecessary for us to discuss the authorities cited by appellant to the effect that where the United States had theretofore parted with its title, a subsequent attempt to pass title to another by patent is void; or that when a patent is issued in violation of a statute or issued as a result of fraud it may, under a proper proceeding, be set aside. We may concede that such hold-

ings are good law. They have, however, no application to the present appeal.

Appellant in support of its contention that a valid mining claim properly located and maintained in accordance with law segregates the ground legally embraced therein from the public domain, to the end that the United States may not lawfully convey such ground to a subsequent applicant, cites, among others, the following cases: Van Ness v. Rooney, 160 Cal. 131, 116 P. 392; Ames v. Empire Star Mines Co., 17 Cal. 2d 213, 110 P. 2d 13; Montgomery v. Gerlinger, 146 Cal. App. 2d 650, 304 P. 2d 93; In re Emblen, 161 U. S. 52, 16 S. Ct. 487, 40 L. Ed. 613; St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U. S. 650, 19 S. Ct. 61, 43 L. Ed. 320; Brown v. Luddy, 121 Cal. App. 494, 9 P. 2d 326. A careful examination of those cases shows that in every one the mining claim upon which reliance was placed was a valid mining claim. While the facts differed in each of such cases, they showed in varying degree, that the mining claims were known to exist, that they could be identified and defined, that an actual location had been made, that a valuable mineral deposit on the lands had been discovered, that the location had been perfected in accordance with law, that the lands had become "known mineral lands," that the claims had been duly located. Proof of such facts is entirely lacking here.

(2) At this point it is important to consider the following: As under state practice, a demurrer to the bill in the federal court under the old federal rules, before the adoption of the new federal rules of civil procedure and before the demurrer was abolished in favor of the motion to dismiss, admitted the truth of the allegations

of the bill. But for the acknowledged beneficial purposes of the motion for summary judgment, to the end that a long and protracted trial may be avoided if there be no disputed questions of fact, a motion for summary judgment now may be supported not only by the pleadings but by discovery procedures, demand for admissions, affidavits and depositions, etc. NRCP 56, discussed infra. Assuredly, in support of Dredge's own motion for summary judgment and in opposition to Husite's motion for summary judgment, Dredge was called upon to submit some factual proof through some of the methods permitted by NRCP rather than to repeat: "We own the ground. We had valid claims on it." We have heretofore cited in some detail Dredge's more definite statement filed in response to Husite's demand. Yet it refrained from any allegation or assertion that it had ever made a discovery of mineral to any extent whatsoever, or of any value whatsoever, that it ever erected a monument, drove a stake, or posted a notice, restricting itself to an unsworn statement signed by its attorneys that it had recorded *location notices*, whose dates showed that the "asserted locations" had been made over two years after the filing of Husite's exchange application. Dredge's only mention of a discovery is the unsworn statement, signed by its attorneys, in its "More Definite Statement," identifying the date of July 14, 1952 for the recording of its location notices by stating that the date of discovery of minerals corresponds to the date of location.

(3) During oral argument counsel for Dredge was asked whether he considered his attack upon the patent as a direct or collateral attack. He was inclined to think it was a direct attack, but contended that it made no dif-

ference. Burke v. Southern Pacific R. R. Co., supra, indicates clearly that the Supreme Court of the United States considered the attack to be collateral. This must indeed be so. A direct attack upon the patent could only be by an appeal within the proceeding or a suit against the government. The present attack first appears in Dredge's second cause of action against Husite, asserting that Husite claimed title by reason of its two patents from the United States and which conveyed no mineral rights to Husite. See our analysis of the pleadings at the beginning of this opinion. It is quite generally held that such an attack is collateral and not direct. Burke v. Southern Pacific R. R. Co., supra; 3 Lindley on Mines, Third Edition, 1889, 892, sec. 777; Round Mountain v. Round Mountain Sphinx Min. Co., 36 Nev. 543, 138 P. 71; Earl v. Morrison, 39 Nev. 120, 154 P. 75; Burfenning v. Chicago & St. Paul Ry., 163 U. S. 321, 16 S. Ct. 1018, 41 L. Ed. 175; Gale v. Best, 78 Cal. 235, 20 P. 550, 12 Am. St. Rep. 44.

(4) Dredge contends that under Section 8, Taylor Grazing Act Exchange (43 U. S. C. A. Chap. 8A, sec. 315g (1961 Supp.)), 48 Stats. 1272, the Bureau of Land Management was compelled to reserve any minerals from any patent issued. The section relied on reads in part as follows: "When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States." It is clear however that this provision does not apply to the present case, but is restricted to exchanges between a state and the United States. This is covered by 43 C.F.R. 147.1. The approval of Husite's exchange application was under 43 U. S. C. A., Chap. 8A, sec.

315g (1961 Supp.), subsections (b) and (d), pursuant to which the regulations of the Secretary, 43 C.F.R. 146, have to do with exchanges between individuals and the United States. The regulations provided that under such exchange the Secretary is authorized "when the public interests will be benefited thereby to accept on behalf of the United States title to any privately owned land within or without the boundaries of a grazing district and in exchange therefor to issue a patent for not to exceed an equal value of surveyed grazing district land * * *. Either party to an exchange may make reservations of minerals, easements, or rights of use. Whether an exchange will benefit the public interest shall be determined by the officer authorized to act [as provided in paragraph (b) of this section.]"

Under the foregoing provisions this was not an acre for acre exchange, as between a state and the United States requiring a reservation of minerals, but a value for value exchange between an individual and the United States, which did not contain such a restriction but placed it within the discretion and judgment of the land office.

(5) Dredge contends: "There was no claim by defendant Husite that there ever was a hearing or decision concerning the validity of the eight Dredge placer mining claims herein involved prior to the issuance of its patents, or at any other time. Before there could be any such decision, a contest must have been filed; a hearing must have been held under the Administrative Act, a decision rendered, with possible appeals and court action following." But the only thing before the Bureau of Land Management was the Husite exchange application. The record does not show just when the Bureau of Land

Management made its examination of the ground to determine its mineral or nonmineral character. It must be assumed however that at some time during the period of two years before the asserted Dredge locations were made, such examination and determination had been made, and the application was in process of going through the usual channels for issuance of patent. During that entire two-year period there had not been any mineral location on the ground, any evidence of mining operations, any monument claiming a discovery or a location, any stakes of any kind indicating a mining claim, any evidence to indicate that it was known mineral ground, any filing in any office indicating that any part of the ground was claimed as mineral ground. Under these circumstances (and without considering, for the moment, the fact that no protest or objection had been made following the publication of the exchange entry) there was nothing before the Bureau of Land Management to initiate a hearing and determination with reference to the validity of any mining claim. None such existed. There was nothing to call for any application of the Administrative Procedure Act.

(6) Dredge contends: "The actions and procedures of Husite in connection with the exchange, and the action of the Department of the Interior in attempting to deprive appellant, The Dredge Corporation, of its property are, and each is, in violation of The Constitution of the United States and of The Constitution of the State of Nevada, and therefore void, because such actions and procedures denied to The Dredge Corporation due process of law. They are also contrary to the provisions of Federal Mining Laws and the Administrative Procedure Act."

That this contention is without merit is evident from the undisputed facts. Dredge does not even assert that it was ever on or ever claimed or ever heard of any part of this land for over two years after Husite filed its exchange application. Upon the filing of such application the Bureau of Land Management published notice that any adverse claimants should file their claims or objections with the Bureau. Dredge had notice and knowledge of the filing of the exchange application but filed no claims to any part of the land or any objections to the granting of Husite's application. As the application antedated by over two years any connection that Dredge may have had with this land or the title thereto, it is inconceivable that action thereon by the Department of the Interior could have violated any constitutional rights or any parts of the Administrative Procedure Act with reference to the nonexistent claims of Dredge.

(7) Dredge contends that it was the duty of the Bureau of Land Management, before proceeding to a patent in favor of Husite, to institute a proceeding to determine the validity or invalidity of Dredge's placer locations and to make a determination thereof after notice and hearing. As we have seen, for over two years after Husite's exchange application had been filed, there was nothing to indicate that Dredge had any interest or that anyone contended that the ground was mineral in character. As we have seen, the issuance of patent was a final judgment of the nonmineral character of the land, and the jurisdiction of the land department ended. This would appear to dispose of Dredge's contention that the land department was without jurisdiction to patent the land to Husite

without having first, after notice and hearing, declared Dredge's mineral claims invalid.

(8) In support of its contention that Husite should be adjudged to be a trustee holding the land in trust for Dredge, it relies upon one sentence appearing in In In re Emblen, 161 U. S. 52, 16 S. Ct. 487, 40 L. Ed. 613. In that case a subsequent mineral claimant sought mandamus to compel the Secretary of the Interior to hold a hearing to determine the mineral or nonmineral character of the land. The United States Supreme Court, after holding that the land department had lost jurisdiction with the issuance of the patent and that the same could not be revoked or set aside except upon judicial proceedings instituted in behalf of the United States, said: "The only remedy of Emblen is by bill in equity to charge Weed [the patentee] with a trust in his favor." Dredge says: "This is precisely what we have done." The court's statement does not, of course, mean that every subsequent mineral claimant against a nonmineral patentee has such a claim or cause of action in equity. If the court could properly conclude, on the respective motions for summary judgment, that Dredge had no valid mining claims, then the imposition of a trust upon Husite's patent title for the benefit of Dredge's non-existing equitable title would be an empty gesture.

The conflicting affidavits referred to by appellant as presenting issues of fact requiring a trial had to do in the main with the legal effect of Dredge's failure to protest Husite's application; but, by reason of the conclusions reached by us, the only determinations required were determinations on questions of law.

(9) In view of our conclusion that the summary judgment in favor of Husite must be affirmed by reason of the entire absence in the record of any showing that the Dredge Corporation was the owner of valid mining claims on the property, we have not found it necessary to determine on this appeal whether or not Dredge was estopped from asserting the claims by reason of its failure to object to the granting of Husite's exchange application after notice and knowledge of Husite's application.[1]

(10) Dredge contends, citing numerous authorities, with which we are in entire agreement. (see Parman v. Petricciani, 70 Nev. 427, 436, 272 P. 2d 492), that summary judgment is improper where any issues of fact remain for determination. It asserts that the conflicts raised in the supporting affidavit of Husite's motion for summary judgment and Dredge's affidavit

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[1]In mining patent conflicts such failure to protest or object estops the claimant from later asserting his claims. 30 U.S.C.A. secs. 29, 30.

No case has been cited from any court holding that a mining claimant is likewise estopped by failure to object to an exchange application. The commissioner of the General Land Office in James R. Crawford, 53 I.D. 435, 438, had held in the case of a conflict of mining claimants with a school land indemnity list: "'Moreover, it is as incumbent upon mineral claimants to keep advised of non-mineral applications pending in the General Land Office as it is to keep advised of mineral applications against which it would be necessary to file an adverse claim.'" The Secretary affirmed on the ground of the conclusiveness of the approval of the school land indemnity list and on the ground that there was no clear, unequivocal, and convincing evidence of fraud, nor that the approval of the list was the result of any error, mistake, or inadvertence in the Land Department. The Secretary stated however that the department was not in agreement with the commissioner's holding that the failure to protest was "attended with the same fatality to his possessory right as would follow from his failure to adverse a hostile mineral application. * * *" Crawford's motion for rehearing before the Secretary was denied. 53 I.D. 435, 439.

in support of its opposition thereto present conflicting questions of fact which can be determined only by trial. As we have seen, the conflict in reality presented an issue of law and it was the province of the court to determine the same.

But Dredge contends that in any event questions of fact for determination resulted from the pleadings. Its argument is: "Dredge asserts that it is the owner of valid mining claims. Husite denies this. Cases interpreting the federal rules encourage the pleading of conclusions. The facts that will determine these conclusions were thus triable by the court." We must reject this contention.

NRCP 56, concerning summary judgment, is identical with the federal rule. Subdivision (e) reads in part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters therein stated. * * *" In Lockhart v. Macclean, 77 Nev. 210, 361 P. 2d 670, we affirmed a summary judgment in favor of the defendant. The plaintiff there contended on appeal that facts recited in an affidavit used in opposition to the motion for summary judgment required that the matter be tried. However, we approved the district court's ruling that the plaintiff had not shown that the affiant was a competent witness. Franktown Creek Irrigation Co. v. Marlette Lake, 77 Nev. 348, 364 P. 2d 1069, involved an appeal from the district court's judgment affirming the final adjudication of the state engineer in a general adjudication proceeding to determine the relative water rights of the users of Franktown Creek. In such cases

exceptions to the state engineer's final order of determination constitute pleadings. The exceptions of the appellant had been verified by appellant's secretary and contained the statement that appellant's use of the waters during the required statutory period was "open, notorious, hostile, and adverse." Appellant insisted that such averment in its pleading, verified by an officer of the company, created an issue of material fact and thus precluded a summary judgment. However the affiant subsequently gave a fact deposition covering the same subject matter which did not support the averment mentioned. We said: "Under such circumstances, we hold that in deciding whether an issue of fact is raised, the lower court must rely upon the fact deposition of such person and disregard the conclusions of his verified pleading. Bennett v. Flanigon, 220 F. 2d 799, 803." Franktown Creek Irrigation Co. v. Marlette, supra, at 352. The amended complaint, upon which Dredge relies in support of its contention that such amended complaint presented a factual issue, was verified by plaintiff's attorney as "true to the best of his knowledge, and has been related to your affiant by the plaintiff [corporation] herein." The "More Definite Statement," furnished by Dredge in response to Husite's demand and on which Dredge relies for its recital of facts requiring a trial, is signed by Dredge's attorneys but contains no verification of any kind. Dredge's proposed amended complaint adding two additional causes of action is likewise signed by Dredge's attorneys without any verification. In United States v. Halpern, 260 F. 2d 590, the court, citing numerous authorities, said: "Rule 56(e) of the Federal Rules of Civil Procedure, 28 U. S. C. A., requires

that affidavits opposing, as well as supporting, summary judgment shall be made on personal knowledge of facts which would be admissible on evidence. The opposing affidavit of the defendants' counsel was accordingly clearly incompetent to raise an issue of fact which would bar summary judgment. * * * Since the answer did not controvert the allegations of the complaint by denying them or by setting up countervailing facts and since the allegations of the complaint were categorically supported by facts stated specifically on personal knowledge in the plaintiffs' supporting affidavit and not rebutted, the record did not disclose a genuine issue as to any material fact."[2] The portions of the record and pleading relied upon by Dredge did not present factual issues which would preclude a summary judgment.

(11) Dredge assigns error in the trial court's denial of its motion for leave to file a further amended complaint adding a third and fourth cause of action. The proposed third cause of action again discusses the opposing affidavits to the asserted effect that the same estopped Husite from asserting Dredge's failure to protest Husite's exchange application. This adds nothing new. The third proposed cause of action further asserts that Husite "for the purpose of defrauding the

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[2]In a preliminary draft of proposed amendments to Rules of Civil Procedure for the United States district courts (Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., October 1961) the Committee, in recommending an amendment not pertinent here, said "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. * * * It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment."

plaintiff of its title thereto" falsely represented to the land department that the selected lands were unappropriated and not occupied, claimed, improved, or cultivated adversely to the applicant; that such false statement was made to deceive the department and defraud Dredge, and as a true statement had been made "that location notices of the eight placer mining claims owned by the Dredge Corporation were of record and * * * in conflict" with Husite's application, the department should have set up a hearing to determine the mineral character of the eight placers and their validity; that the department made no investigation or determination; and that the land is in fact mineral. Most of these matters have heretofore been discussed. Husite's affidavit that the land was unoccupied and unclaimed, as against Dredge's placers, we have seen to be true. The placers were not attempted to be located or notices recorded until two years after the exchange application. The third cause of action thus added nothing.

The proposed fourth cause of action was based on appellant's affidavit as supporting "the [oral] contract of Husite to convey to The Dredge Corporation complete title to sections 16 and 21," and the prayer is that Husite be ordered to convey to Dredge all the mineral rights in the property. To have permitted this amendment would simply have permitted the assertion of a claim which was on its face barred by the statute of frauds. NRS 111.205(1). There was neither error nor abuse of discretion in denying the motion to amend by adding these two causes of action.

(12) Dredge's brief in support of its motion for summary judgment and in opposition to defendant's motion for summary judgment was filed May 31, 1960, and its closing brief on these motions was filed December 5, 1960. Both briefs are voluminous and in effect argue the same points and cite the same authorities which it has presented to this court on its appeal. On January 5, 1961, the court advised counsel that upon the review of the record it did not feel that further oral argument would be appropriate and that a decision would be rendered as the matter then stood submitted. Dredge assigns this action as error. The assignment has no merit.

The order and judgment denying appellant's motion for summary judgment and granting respondent's motion for summary judgment and dismissing plaintiff's complaint with prejudice are hereby affirmed with costs.

McNamee and Thompson, *JJ.*, concur.

Note—These printed advance opinions are mailed out immediately as a service to members of the bench and bar. They are subject to modification or withdrawal possibly resulting from petitions for rehearing. Any such action taken by the court will be noted on subsequent advance sheets.

C. R. DAVENPORT, *Clerk.*

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 226

THE DREDGE CORPORATION, a Nevada corporation,
Petitioner,

vs.

HUSITE COMPANY, a Nevada corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Brief for Respondent in Opposition

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Brief for Respondent in Opposition

JURISDICTION

The jurisdiction of this Court is acknowledged.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The Taylor Grazing Act, 43 U. S. C., Ch. 8A, § 315g and § 315c; pertinent portions of the *Land Management Manual, Vol. 5, Lands, Chap. 1.12, Requests for Reports and Chapter 2.15, Private Exchanges-Taylor Act.*

QUESTIONS PRESENTED

The form of presentation of the questions is accepted by Respondent. Those portions argumentative in nature will be subsequently referred to.

STATEMENT

Petitioner's statement sets forth a chronological analysis of the occurrences before the lower Courts. Authorities are inserted therein in behalf of Petitioner's position and which will be distinguished by Respondent in that portion of this brief designated "*Argument.*"

ARGUMENT

Reference will be first made to the cases cited by Petitioner and to their disposition. First cited is that of *Emil L. Krushnic v. U. S.*, 280 U.S. 305, 74 L. Ed. 445, as the authority for its claim of property right. At page 15 in the opinion of the Nevada Supreme Court reference is made to this case as *Wilbur v. United States*, 280 U.S. 306, 50 S. Ct. 103, 74 L. Ed. 445. Nothing could be more clear than the consideration given this authority by the Nevada Supreme Court, together with that Court's reasons why this citation, while a good statement of law, was not applicable to this case.

As authority for the requirement of a hearing, Petitioner cites *United States v. Keith V. O'Leary et al*, A-27260, 63 I. D. p. 341. Further reference is made to this citation as follows. This case does, in effect, in quoting from *Cameron v. United States*, 252 U.S. 450, 460, 461, state that:

> "Due process in such a case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination by the Land Department."

The case does make the exception, in quoting from *U. S. v. Tucker Truck Lines*, 344 U.S. 33, which case involved an application for a permit under the ICC. The court there holds that the objection that the hearing examiner was not appointed in conformity with the provisions of the Administrative Procedure Act cannot be raised after the examining officer has made his findings. In that Supreme Court case the objection to the method of appointment of the examiner of the ICC was raised before the commission at the hearing, but after the examiner had issued the permit. The court held that this is improper and not timely. The court said that there must be an opportunity for correction before it is reviewable by the courts.

In a footnote to the case, the court pointed out that the government informed the court that in about 5,000 cases commenced after the date of the Administrative Procedure Act, orders are for an indefinite period vulnerable to attack if no timely objection during the administrative process is required. The policy of the commission is to grant application for rehearing in cases where applicant made the objection before the examiner, Since the established practice is not to consider issues not raised before the examiner, it will refuse hearings in other cases. The Supreme Court went on to say:

> "Simple fairness to those who are engaged in the task of administration and to litigants requires the general rule the court should not topple over administrative decisions unless the administrative body not only has erred, but has erred against objection made at the time appropriate under this practice."

Petitioner, in support of its contention that the Department of the Interior has deprived Dredge of its property in violation of the Constitution of the United States, refers

to Appendix, Page 24, being the Nevada Supreme Court Opinion, as follows:

> "That this contention is without merit is evident from the undisputed facts. Dredge does not even assert that it was ever on or ever claimed or ever heard of any part of this land for over two years after Husite filed its exchange application. Upon the filing of such application the Bureau of Land Management published notice that any adverse claimants should file their claims or objections with the Bureau. Dredge had notice and knowledge of the filing of the exchange application but filed no claims to any part of the land or any objections to the granting of Husite's application. As the application antedated by over two years any connection that Dredge may have had with this land or the title thereto, it is inconceivable that action thereon by the Department of the Interior could have violated any constitutional rights or any parts of the Administrative Procedure Act with reference to the nonexistent claims of Dredge."

Petitioner then attempts to negate this holding by the mere statement that Petitioner had recorded its mining locations prior to *published* notice by Respondent. This statement is true, but not contrary to or in conflict with the statement and reasoning of the Supreme Court of the State of Nevada.

Noyes v. Mantle, 127 U.S. 348, 32 L. Ed. 168, 8 S. Ct. Rep. 1132-1; *Montgomery v. Gerlinger*, 146 Cal. App. 2d 650, 304 P.2d 93; and *St. Louis Mining and Milling Co. v. Montgomery Mining Co.*, 171 U.S. 650, 655, 43 L. Ed. 320, 322, 19 S. Ct. Rep. 61 and 63 are next referred to by Petitioner. Petitioner refers to the decision of the Supreme Court of the State of Nevada and particularly to page 20 thereof wherein that Court considered the cases and distinguished them as follows:

"The Supreme Court of the State of Nevada then concluded that the cases cited did not apply since proof of a valid mining claim did not exist in the pleadings of Dredge.

The Supreme Court of Nevada in its opinion states (Appendix, p. 20):

> "We have heretofore cited in some detail Dredge's more definite statement filed in response to Husite's demand. Yet it refrained from any allegation or assertion that it had ever made a discovery of mineral, to any extent whatsoever, that it ever erected a monument, drove a stake, or posted a notice, restricting itself to any unsworn statement signed by its attorneys that it had recorded *location notices*, whose dates showed that the "asserted locations" had been made over two years after the filing of Husite's exchange application.'"

Petitioner has raised five questions which are accepted by Respondent as to form. The first of these questions has to do with 43 U. S. C. § 315c, which recites as follows:

> "*Rights of way; development of mineral resources* Nothing contained in this chapter shall restrict the acquisition, granting or use of permits or rights-of-way within grazing districts under existing laws; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing contained in this chapter shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto. (June 28, 1934, C. 865, § 6, 48 Stat. 1272.)"

There can be no argument with this provision of the Taylor Grazing Act in that it reserves to the public the rights to go upon federally held land under this provision. If there were no patent applied for on the land in question,

or if this were the land received in exchange by the U. S. Government, no question would be raised at all. Actually, Petitioner's question number 3 must be taken in conjunction with question number 1. If Petitioner's reasoning were followed, a person may go upon lands upon which a patent application is pending two years after the application has been filed, and by recording notices of location, obtain an immediately absolute right against the applicant, even though such person chooses not to appear and notify the Bureau of Land Management of these claims. It is difficult to see how Petitioner herein can maintain a denial of due process of the refusal of a right to be heard when the Petitioner had actual and constructive notice of Respondent's application and refused to avail itself of the forum provided. In the case of *James R. Crawford*, 53 I.D. 435, 438, such a problem was met and referred to in the Nevada Supreme Court opinion at page 26, paragraph (9), with footnote, as follows:

> "(9) In view of our conclusion that the summary judgment in favor of Husite must be affirmed by reason of the entire absence in the record of any showing that the Dredge Corporation was the owner of valid mining claims on the property, we have not found it necessary to determine on this appeal whether or not Dredge was estopped from asserting the claims by reason of its failure to object to the granting of Husite's exchange application after notice and knowledge of Husite's application.[1]
>
> No case has been cited from any court holding that a mining claimant is likewise estopped by failure to object to an exchange application. The commissioner of the General Land Office in James R. Crawford, 53 I.D.

1. In mining patent conflicts such failure to protest or object estops the claimant from later asserting his claims. 30 U.S.C.A. Secs. 29, 30.

435, 438, had held in the case of a conflict of mining claimants with a school land indemnity list: "'Moreover, it is as incumbent upon mineral claimants to keep advised of non-mineral applications pending in the General Land Office as it is to keep advised of mineral applications against which it would be necessary to file an adverse claim.'" The Secretary affirmed on the ground of the conclusiveness of the approval of the school land indemnity list and on the ground that there was no clear, unequivocal, and convincing evidence of fraud, nor that the approval of the list was the result of any error, mistake, or inadvertence in the Land Department. The Secretary stated however that the department was not in agreement with the commissioner's holding that the failure to protest was "attended with the same fatality to his possessory right as would follow from his failure to adverse a hostile mineral application. * * *" Crawford's motion for rehearing before the Secretary was denied. 53 I.D. 435, 439."

Question number 4 desires an answer as to whether or not an application for exchange under the Taylor Grazing Act segregates the land from appropriation under mining laws. More in point would be whether or not the application of Respondent and all attendant circumstances segregates the land insofar as Petitioner was concerned under those same circumstances. We again respectfully draw the Court's attention to the reasoning of the Nevada Supreme Court, at page 26, Nevada Supreme Court opinion, and footnote 1 contained therein.

Petitioner's question number 5 again reiterates Petitioner's allegation that the validity of the mining claim was placed at issue and that there had been no administrative proceeding to determine its validity. Therefore, there could have been no summary judgment. At page 16 of the Petition herein, Petitioner states as follows:

> "There can be no question that had petitioner filed a protest during the pendency of Husite's application for exchange that a hearing would have taken place and petitioner would have been afforded due process."

We are in complete accord with Petitioner's statement in this regard, and that, taken together with the *Crawford* case and the failure to set forth material facts placing the validity of the alleged claims in issue before the lower Court, disposes of this question.

At this time, mention should be made of the conclusiveness of the patent when issued and further, the conclusive presumption that all antecedent procedural steps have been followed.

> "A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken."
>
> *Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co.*, 36 Nev. 543, 138 P. 71.

Reference to the rule as cited under this heading are to *Bureau of Land Management Manual, Volume V., Lands, Chapter 1.12, Requests for Reports and Chapter 2.15, Private Exchanges—Taylor Act.*

The manual states that private exchanges are transactions whereby the United States acquired title to private lands in exchange for public lands pursuant to authority granted by the Taylor Grazing Act. (Chap. 2.15.1) and that either party to a private exchange may reserve the minerals. (Chap. 2.15.6)

These rules provide that when application for exchange is filed, the Adjudication Officer of the Bureau shall examine it (Chap. 2.15.9) and request a report from the Geological Survey. (Chaps. 2.15.10, 1.12.1) These rules also

require that in this report the Geological Survey must state that the selected lands are either (a) valuable for specified minerals, or (b) are not valuable for minerals, or (c) may be valuable for minerals. In the latter case, the Geological Survey must recommend investigation by the Bureau of Land Management. (Chap. 1.12.3) The case record is then referred by the Adjudication Officer to the Land Classification Officer (Chap. 2.15.11) who undertakes the necessary investigation and then reports to the Adjudication Officer, among other things, "The mineral character of the lands, including information as to any mining claims known to be of record or observed upon the land." (Chap. 2.15.19) The Adjudication Officer in examining the application must determine that "the proposed mineral reservations conform to the policy of the Department". (Chap. 2.15.9J) and if not, the application is rejected "unless the Land Classification Officer finds that the public interest might be seriously injured thereby." (Chap. 2.12.12G (1)) "If disposal of all conflicts is favorable to the applicant and the selected land is and should be available to (the applicant) the Adjudication Officer will issue a decision:

A. Authorizing publication.

B. Listing all reservations included in the patent." (Chap. 2.15.15)

After receipt of proof of publication, the Adjudication Officer is required to have:

"A. Protest and appeals, if any, processed to completion." (Chap. 2.15.16A)

If all is regular, the decision issues accepting the offered lands, approving the selected lands for patenting and listing all reservations to be included in the patent. (Chap. 2.15.16C).

Petitioner herein has raised these questions before the trial court, the Supreme Court of the State of Nevada, and now seeks review from this Court. In the face of admissions found in the chronological order of events, which indicate its first entrance upon the property two years after Respondent filed the application for exchange an opportunity to be heard and lack of utilization of that opportunity and a further delay from the time that the patent was granted to Respondent in 1953 until an action for quiet title was brought in 1959. In attempting to explain these circumstances, Petitioner, in essence, maintains that it is not required to appear in answer to notice by reason of the phraseology of *43 U.S.C. § 315r*, which we submit is not in conflict with the provisions of *43 U.S.C. § 315q*, and not applicable.

The admissions of Petitioner, together with the Bureau of Land Management Manual, the conclusiveness of the determination when patent is granted as set forth in *Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co.*, and the rights of a pending patent applicant as found in the *Crawford* case, successfully answers the questions propounded by Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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